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ICCC Informal Advisory # 88:

Per Diem Charge on Honored NSF Checks As A Finance Charge Under the ICCC and Iowa Common Law

I. ISSUE

Our office and the Banking Division have received inquiries on the question of whether a Daily Overdrawn Account Fee, a *per diem* fee charged when the bank decides to honor a check for which there are insufficient funds in the maker's account, is a finance charge under the ICCC. Both offices have previously taken the position that such charges are finance charges. See Doland Letter, April 8, 1994 and Supt. of Banking Interpretive Bulletin # 9, December 4, 1997, (copies attached.). The recent inquiries asked that we review the earlier position.

An example of the issue follows: Bank's fee schedule lists two separate per item NSF fees and a *per diem* NSF fee. Each per item fee is $20, one for "overdraft -- each debit or check paid," and one for "nonsufficient funds -- each item." A per item fee on an NSF item is charged irrespective of whether the item is paid or dishonored. Bank charges an additional $5 *per diem* (daily) fee when the item is honored despite there being insufficient funds in the account.

The inquiries suggested that the earlier positions of the office of the Administrator and the Banking Division should be reversed because a) there is no credit extended, b) there is no mutual agreement to extend credit, nor obligation on the bank's part to extend credit, but rather a unilateral accommodation by the bank, c) they are charges under a deposit agreement, not a credit agreement,[1] d) they are appropriate "non-interest" charges to compensate for costs in

[1] This argument is that per item overdraft and NSF charges are not finance charges under the ICCC because they are charges under the deposit agreement rather than an extension of credit, which, in turn, would support treating *per diem* charges the same. We do not believe that the fact that the charges are authorized by a deposit agreement is determinative. As will become evident later, charges made under a deposit agreement can be "incident to" an extension of credit," and therefore constitute a finance charge. The question is whether there is, in fact, an extension of credit, not whether the credit-related charge is imposed pursuant to a deposit agreement or an explicit credit agreement. It is the case that, under Truth in Lending, a per item overdraft charge which is imposed irrespective of whether an item is paid or not is not a finance charge. But the basis for that is not that the charge is authorized by a deposit agreement rather than a credit agreement, but rather that it is equally payable with or without the "credit." This was articulated more clearly in Reg. Z OSC § 226.4(b)(2)-1 prior to the 1998 amendment. ("[A]

administering an account and deter misuse, and e) Truth in Lending does not consider them finance charges, and so neither should the ICCC. These arguments posit that the *per diem* charges imposed when an insufficient funds item is paid should be analyzed under the same standard as the flat fee imposed on an NSF item irrespective of whether it is paid or not.

To assure clarity, it may be helpful to emphasize the precise boundaries of the question:

* Neither the question posed nor the analysis relates to the standard per item NSF fee which is imposed irrespective of whether an insufficient funds check is returned or honored, but solely to the daily charge imposed when the bank decides to honor the check.

* Neither the question nor the analysis relates to the situation where the bank and its customer have entered into a contractual overdraft protection agreement -- a credit contract. It relates solely to the situation where the bank makes a unilateral decision as to whether to honor a given check or reject it without having a contractual obligation to do so.

II. SUMMARY

There is no basis for reversing the earlier positions. When a bank decides to pay out on a check for which insufficient funds exist, the bank has made a loan under both the ICCC and Iowa common law. The bank thereby becomes a creditor of the debtor-maker. The charge imposed by the creditor on that advance is a finance charge as that term is defined by the Iowa Consumer Credit Code.

It has been urged that we interpret the ICCC consistently with Truth in Lending authority to the contrary, given the general consistency between the two laws. However, as to this particular charge, TIL authority is not only not controlling, it is irrelevant. Regulation Z includes a specific exclusion from the TIL definition of "finance charge" for this type of charge, whereas the ICCC does not. While consistent provisions in the two laws should be interpreted consistently, that principle cannot be stretched so far as to create exclusions from the statutory definition of finance charge out of whole cloth.

III. ANALYSIS

A. A Bank's Advances To Pay An NSF Check Are a Loan, and the Bank Becomes A Creditor In Making Such Advances Under Both Iowa Common Law and the ICCC

The crux of the argument to the contrary is that when a bank advances funds as a result of a unilateral decision, there is no credit. And without credit, according to this analysis, there can be no finance charge. However, contrary to this argument, the charges imposed as a

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charge imposed uniformly for any item that overdraws a checking account, regardless of whether the items are paid or returned and whether the account has a credit feature or not, is not a finance charge." The 1998 amendment, while not changing that position substantively, does not articulate it as clearly.)

consequence of writing an NSF check are conceptually, economically, and legally distinct from charges imposed only when the bank advances money to fund the NSF check.

Outside of the context of the ICCC, the Iowa Supreme Court has held that when a bank pays a depositor's check even though there were insufficient funds in the maker's account, the bank has made an extension of credit to the customer. The bank "thereby becomes a creditor of the debtor." *Security State Bank v. Firstar Bank Milwaukee*, 965 F. Supp. 1237, 1247 (N.D. Iowa 1997), citing *C & H Farm Service Co. of Iowa v. Farmers Savings Bank*, 449 N.W.2d 866 (Iowa 1989). See also *Clinton Nat. Bank v. Saucier*, 580 N.W.2d 717, 720 (Iowa 1998); *State v. Mullin*, 225 N.W.2d 305, 308 (Iowa 1975) (bank's payment of overdraft is extension of credit to customer). This is the law in a number of other jurisdictions, as well, see cases collected in *Tony's Tortilla Factory, Inc., v. First Bank*, 857 S.W.2d 580 (Ct. App. Tex. 1993); 11 Am. Jur. 2d *Banks & Financial Institutions* § 937 (1997).

While the Office of the Comptroller of the Currency's definitions are not controlling for purposes of state law, 12 C.F.R. § 7.4001(c), and its position is therefore not determinative on the question under the ICCC, even the OCC has taken the position that

> when a bank pays a check written on nonsufficient funds, it, in effect, extends a loan to the customer in an amount equal to the amount of the check minus the amount that is present in the customer's check account.

OCC Interpretive Letter, 1984 WL 164096 (May 22, 1984.)[2] The interpretive letter goes on to refer to the charges on loans of this type as interest. It notes that the national bank would be limited under 12 U.S.C. § 85 to the interest rate available to the most favored lender [making similar types of loans] or the alternate federal rate of 1% above the federal discount rate.

The relevant definitions in the ICCC demonstrate that, in this instance, an ICCC analysis is on all fours with the common law characterization of such unilateral advances as loans.

> * A *loan* means any of the following... the creation of debt by the lender's <u>payment of **or**</u> agreement to pay money to the debtor <u>or a third person for the account of the debtor.</u> ICCC § 537.1301(25)(a)(1). (emphasis added).
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> * *Credit* is the right granted by a person extending credit to a person to defer payment of debt, to incur debt and defer payment.... ICCC § 537.1301(15).

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[2] We have reviewed the OCC's amicus brief in *Nicholas v. Deposit Guaranty National Bank*, 182 F.R.D. 226 (S.D. Miss. 1998), which has been offered as support for the position that *per diem* fees are not a finance charge. However, that case dealt with the per item fee charged irrespective of whether the items were paid or bounced, not a *per diem* fee. (The OCC is the regulator for national banks. Its interpretation of "interest" is as that term is used in the National Bank Act, 12 U.S.C. § 85.)

The common law cases, and the text of the ICCC belie any requirement that credit can be created only by a mutually-agreed upon contract, as one inquirer posited. The ICCC specifically uses the disjunctive in the phrase "payment of **or** agreement to pay."[3] The ICCC definition of credit refers solely to the action of the person with the funds -- "the right granted by a person extending credit." Indeed, given the purposes of the ICCC, the very lack of mutuality militates more toward application of the Code than against it. As will be discussed in Section III-D below, the daily charge could easily exceed a 1000% APR, which is precisely the type of market conduct which the ICCC was designed to assure only happens when the market is operating with integrity, and with the customer's full understanding.

These definitions clearly establish the bank's advances as an extension of credit, in particular a loan, under the ICCC. But the ICCC does not cover all loans.[4] Under the ICCC, a creditor is a person who grants credit in a consumer credit transaction, ICCC § 537.1301(17), and a consumer credit transaction includes a <u>consumer</u> loan, ICCC § 537.1301(11). A <u>consumer</u> loan, in turn, must meet a five-pronged definition: (i) the person is regularly engaged in the business of making loans, (ii) the debtor is a natural person, (iii) the debt is incurred primarily for a personal family or household purpose, (iv) the debt is either payable in installments, or a finance charge is made, and (v) is less than $25,000. § 537.1301(14).

A bank obviously regularly engages in the business of making loans, so the first prong is met. Prongs (ii), (iii), and (v), of course, will vary with individual circumstances. That leaves the fourth prong to be determined, whether the debt is payable in installments[5] or a finance charge is imposed. As noted above, the OCC referred to the price the bank places on these advances as "interest."[6] Since the *per diem* charge is only imposed on transactions where the maker's shortfall is advanced, the charges relate to that advance, for it is only that advance that distinguishes this charge from the per <u>item</u> charge imposed on any NSF check whether paid or not.

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[3] ICCC § 537.1301(25)(a)(1) (emphasis added). Even if an "agreement" were necessary, the ICCC definition includes agreements implied from course of dealing or course of performance. ICCC § 537.1301(3).

[4] The questions presented asked solely whether the per diem charges were a finance charge under the ICCC. The fact that Iowa common law treats these advances as loans raises questions about whether the per diem charges are interest on the advances outside the ICCC context, as well. While this advisory addresses only the ICCC issue, as that was the sole question presented, it warrants noting that the Iowa Supreme Court has also had occasion to analyze a national bank's charge on overdraft advances as interest. *Talbot v. First National Bank,* 76 N.W. 726 (Iowa 1898), *aff'd on other grounds*, 185 U.S. 172 (1902).

[5] *"Payable in installments"* means there is an agreement to pay in more than four payments." Iowa Code § 537.1301(31). In Iowa, this element does not require a written agreement, while the parallel definition in Reg Z does. Compare Reg. Z, § 226.2(a)(17)(i)(A) with the ICCC definition of "agreement," note 3, above.

[6] In the *amicus* brief from the *Nichols* case, the OCC invoked the common understanding definition of interest as "money paid for the use of funds," Brief, page 5, note 1, citing G. Donald Jud & Charles J. Woelfel, *The Desktop Encyclopedia of Banking* 220 (1988). See also *Talbot,* note 4, above.

But apart from the common understanding of the term, here, too, the ICCC has a specific statutory definition.

> * *Finance charge* means the sum of all charges payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as in incident to or condition of the extension of credit. § 537.1301(19)(a).

B. Comparison of TIL and ICCC Definitions of Finance Charge and Exclusions

Given the thrust of the argument that the ICCC and TIL should be interpreted consistently with respect to *per diem* fees, it is necessary to review TIL treatment of such fees. Both TIL and the ICCC have a similar broad, all-encompassing definition of a finance charge.[7] Both Reg. Z and the ICCC list illustrative examples of the types of charges which fall within the broad definition.[8] Each, however, also build in exclusions: charges which would fit within the broad definition, but by legislation or regulation have been specifically carved out.[9]

The all-encompassing definitions in both are to be broadly interpreted in order to fully effectuate the multiple purposes of both Acts.[10] Conversely, the exclusions to each definition are exclusive listings, which must be narrowly construed if the policies of the statutes are to be fully effectuated.[11]

While ordinarily the two statutes, drafted with a view to harmony, should be interpreted harmoniously, there are differences which must be kept in view. First, TIL is primarily a disclosure statute, with only a few provisions affecting substance, none of which are relevant here. In contrast, the ICCC is a comprehensive code which governs the full spectrum of the creditor and debtor relationship. This is a critical distinction; one which Truth in Lending honors, as well. While inconsistent state disclosure laws are preempted to the extent of the inconsistency,[12] substantive state laws relating to the type, amount or rates of permissible

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[7] Compare 15 USC § 1605(a) and Reg. Z, § 226.4(a) with ICCC § 537.1301(19)(a).

[8] Compare ICCC § 537.1301(19)(a) with Reg. Z § 226.4(b).

[9] ICCC § 537.1301(19)(b); Reg. Z, § 226.4(c)-(e).

[10] ICCC § 537.1102(1); Rodash v. AIB Mortgage Co., 16 F.3d 1142, 1147 (11th Cir. 1994) (Congress strictly requires creditors to disclose all finance charges.)

[11] *Cf. Equity Plus Consumer Finance & Mortgage v. Howes*, 861 P.2d 214 (N.M. 1993); *Buford v. America Fin. Co.*, 333 F. Supp. 1243, 1247 (N.D.Ga. 1971), both holding that TIL exclusions must be narrowly construed.

[12] 15 USC § 1610(a); Reg. Z § 226.28(a). One of the multiple stated purposes of the ICCC is to conform the disclosure regulation to TIL, § 537.1102(2)(f). On the other hand, to conform the substantive definitions would require, for example, that lenders treat all points as interest for state law purposes. *Compare* Iowa Code § 535.8, excluding, within certain limits, points from the state law definition of interest *with* Reg. Z § 226.4(b)(3), under which points are a TIL finance charge without exception.

charges, or defining any element or elements of charges are not affected by TIL. 15 U.S.C. § 1610(b). The question here is whether *per diem* charges are a type or element of the finance charge for substantive purposes under the ICCC.

Second, there is a substantive difference in the two texts as to the definition of a finance charge which makes it impossible to construe them to mean the same thing. Regulation Z, § 226.4(c)(3) specifically excludes from the definition of a finance charge "charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing."[13] In stark contrast, there is no parallel exclusion to the ICCC definition of "finance charge." Compare the shorter list of exclusions in ICCC § 537.1301(19)(b) to Reg. Z § 226.4(c)(3). In view of the clear and unequivocal difference between the explicit TIL exclusion and the non-existent ICCC exclusion as to this particular charge, the ICCC analysis must be made without reference to the Reg. Z exclusion, and cases interpreting the Reg. Z exclusion are not apposite.

C. The Per Diem Fee on Paid NSF Checks Is A Finance Charge Under the ICCC

Section III-A refutes the notion that the advance to fund an NSF item is not a loan. The *per diem* charge, unlike the regular NSF fee charged irrespective of whether it is paid or not, is clearly linked to the advance -- to the loan. It is therefore "incident to or a condition of" the extension of credit.[14] It is a "charge payable directly ... by the consumer and imposed directly by the creditor as an incident to or condition of the extension of credit." Iowa Code § 537.1301(19)(a). In short, it squarely meets the definition of a finance charge.

Because it meets all the relevant elements of the definition, it could only be excluded if there is a specific exclusion under Iowa Code 537.1301(19)(b). As noted in Section III-B, there is no parallel in the ICCC to Reg. Z's exclusion of "charges for paying items that overdraw on an account...."

Neither can the explicitly articulated exclusions of Iowa Code § 537.1301(19)(b) be

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[13] Official Staff Commentary § 226.4(c)(3)-1 explains that "a charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items."

It should be noted, however, that absent the specifically articulated exclusion in § 226.4(c), the per diem fee would be a TIL finance charge under Reg. Z § 226.4(b)(2). The Official Staff Commentary notes that "a checking account or transaction account charge imposed in connection with a credit feature is a finance charge under § 226.4(b)(2) to the extent the charge exceeds the charge for a similar account without a credit feature." OSC § 226.4(b)(2)-1. It is only by virtue of § 226.4(c)(3) that the "credit feature" of an overdraft advance for TIL purposes is limited to a written overdraft agreement, as opposed to TIL's broader definition of credit under Reg. Z § 226.2(a)(14).

[14] It should be noted that those are two independent, alternative standards. TIL also uses the term "incident to or a condition of," and courts have interpreted the term "incident to" to have a distinct meaning. See, e.g. *Pendleton v. American Title Brokers*, 754 F.Supp. 860 (S.D. Ala. 1991).

interpreted to exclude the *per diem* fee. The "default" or "delinquency" exclusion of Iowa Code § 537.1301(19)(b)(1) cannot be stretched to cover per diem fees on paid NSF checks. Indeed, the OCC's brief in *Nicholas v. Deposit Guaranty National Bank*, 182 F.R.D. 226 (S.D. Miss. 1998) states: "presenting an NSF check is not a breach of, or default on, the Deposit Agreement entered into between the parties, but is, instead, an anticipated event under the Deposit Agreement." Amicus Brief of OCC, page 5.[15] Even if one were to analogize NSF-related fees to the ICCC's late charge exclusion, such an analogy would suggest that when the bank chooses to go ahead and fund the check, it would be a finance charge in any event. (The ICCC has an "exclusion to the late charge exclusion," under which late charges are considered to be a finance charge in certain circumstances.[16])

The next stated exclusion, Iowa Code § 537.1301(19)(b)(2) excludes "additional charges" itemized under Iowa Code § 537.2501. The only insufficient funds-related item in the cross-referenced § 537.2501 is the $20 fee allowed to credit card issuers, or $50 in specified circumstances.[17] Section 537.2501 makes no reference to any other NSF-related fees. Consequently, any NSF-related fees that fall outside the scope of the comparatively narrow provisions of § 537.2501(1)(g) are not excluded from the definition of a finance charge by § 537.1301(19)(b).[18]

The remaining two ICCC statutory exclusions to the definition of "finance charge," the credit card merchant discount and RTO charges, § 537.1301(19)(b)(3) and (4), are irrelevant to the credit at issue.

Because the *per diem* fee charged in connection with a bank's payment of an NSF check, meets the definition of a finance charge under § 537.1301(19)(a), and is not excluded under any

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[15] There seems to be some tension between the notion of an overdraft as an anticipated event which is "not a breach... of the Deposit agreement" on the one hand, but yet is something which should be penalized with a deterrence tax on the other. Cf. 12 CRF § 7.4002(b)(2).

[16] The "exclusion to the late charge exclusion" is somewhat confusing at first blush, because it is drafted as a double negative. But the import is that if a creditor imposes a "late" charge, but then goes ahead and continues to carry the credit, (or, by analogy in the NSF context, decides to extend the credit), the charge really is a finance charge. Iowa Code § 537.1301(19)(b)(1). This is similar, but not precisely parallel, to Reg. Z's treatment of late charges. See generally National Consumer Law Center, *Truth in Lending* § 3.9.3 (1995 and Supp.).

[17] Iowa Code § 537.2501(1)(g) excludes the NSF fee provided that it is conspicuously disclosed in the "cardholder agreement." A "cardholder," in turn, is one to whom a credit card is issued or who has agreed with a card issuer to pay obligations arising from the issues or use of the card. Iowa Code § 537.1301(7). "Card issuer" is one who issues a credit card. ICCC § 537.1301(6). "Credit card" is a card or device issued under an arrangement pursuant to which a card issuer gives a cardholder the privilege of obtaining credit from the card issuer or other persons. Iowa Code § 537.1301(16). The use of the adjective "cardholder" as a modifier limits the universe of "agreements" to which the § 537.2501(1)(g) NSF exception applies. See generally ICCC Inf. Adv. # 87, pages 17 - 22.

[18] See note 11 above, regarding the narrow construction of exclusions to the definition of finance charge in TIL.

of the provisions in § 537.1301(19)(b), it is a finance charge under the ICCC. Truth in Lending cases interpreting Reg. Z's specific exclusion for such charges are not apposite, because Reg. Z does have an explicit regulatory exception for charges imposed when a bank pays an NSF item in the absence of a written agreement to do so.

D. Construction of the Fees in Light of the Purpose of the ICCC.

The ICCC is to be liberally construed to effectuate its multiple purposes and policies. Iowa Code § 537.1102(1). Among those purposes are to "further consumer understanding of the terms of credit transactions and foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost," to "protect consumers against unfair practices by some suppliers ... of consumer credit" and to "permit and encourage the development of fair and economically sound consumer credit practices." Iowa Code § 537.1102(2)(c),(d), and (e).

It has been argued that compensation and deterrence are appropriate factors to take into account to justify all NSF-related fees, including the *per diem* fees. Those factors are presumably taken from the OCC's list of considerations to factor into pricing "non-interest" items.[19] Given the determination that under Iowa law the *per diem* fees are a finance charge, it may not be necessary to scrutinize this argument. However, there are a few points to note in that regard.

First, the standard NSF per item fee and the *per diem* fee for paid items should be bifurcated for purposes of making any such analysis. The costs attributable to processing a bounced check are there whether the bank elects to pay the item or not. The average NSF fee appears to range from \$15 - \$30 (\$20 in Iowa). Estimates as to the actual cost to the financial institution, however, are considerably lower, ranging from 30 cents to \$1.32 cents.[20] The discrepancy between the cost to the banks and the fees passed on to its customers have led to challenges to these fees under a variety of legal theories: unconscionability, breach of the duty of good faith and fair dealing, and as having crossed the line from reasonable liquidated damages to unenforceable penalties. Some challenges have succeeded, others have not.[21]

From 1989 to 1992, bank fee income jumped 35%, according to FDIC data. The \$4.35 billion in bounced check fees received by banks in 1992 were over 6 times their direct costs of

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[19] 12 C.F.R. § 7.4002(b).

[20] In *Perdue v. Crocker National Bank,* 702 P.2d 503 (Cal. 1985), a \$6 NSF fee was successfully challenged as unconscionable, when the actual cost was between 30 cents and \$1.00, a 600% profit margin). A 1993 study by the Consumer Federation of America cites data from the Bank Administration Institute concluding that it costs an average of \$1.32 to process a bounced check.

[21] See generally, Annotation, *Bank's Liability to Customer for Imposing Allegedly Excessive Service Charges,* 73 A.L.R.4th 1028 (1989). Also varied are the decisions on the scope of federal preemption. For example, the court in *Perdue v. Crocker National Bank,* 702 P. 2d 503 (Cal. 1985) held that state unconscionability law was not preempted. (It is interesting to consider whether federal unconscionability or good faith and fair dealing doctrine will evolve, should too-generous preemption of state laws leave a vacuum.)

$685 million.[22] More recently, a survey from an Iowa-based firm showed that fees ("non-interest" income) comprised almost one-quarter of total income for banks in 1997, up from 18% in 1995.[23] This data strongly suggests that the flat per item fees compensate for the costs of the bounced checks, and still leave a considerable deterrence tax.

Because the per item fee already covers compensation and a hefty deterrence tax, to assign the *per deim* charges to cover the same costs would be duplicative. Moreover, the customer's conduct which the creditor presumably wishes to deter is the writing of the bad check in the first instance, conduct which is deterred by imposing an NSF fee in excess of costs on all bad-check writers. The factor which distinguishes those who pay the *per diem* fee as well as the per item fee is that the NSF check was paid, a decision made unilaterally by the bank, not the customer. It is difficult to justify imposing a deterrence tax on a party who has no control over the conduct.

The real difference between the per item fee and the per diem fee is that in the latter case the bank has made a loan. The cost differential, then, is compensation to the bank for the debtor-maker's use of the funds. This, of course, is quintessentially interest,[24] -- a finance charge.

It is also a high interest rate. Should a check to the utility company overdraw a customer's account by $120 for whatever reason, Bank imposes a $20 fee, and, if it chooses to fund the check, starts the clock ticking at $5 per day. Should the customer be on vacation, on an out-of-town business trip, in the hospital, or simply waiting for his next pay check and not be able repay this loan for 10 days, there is a total of $190 to be paid -- the $120 loan principal, a $20 per item charge, and a $50 finance charge. That $50 finance charge on a $120 loan for 10 days is an APR of approximately **1520%.**

It would better fulfill the purposes of the ICCC to further consumer understanding and foster competition so that credit is available at a reasonable cost, and encourage the development of fair and economically sound practices if the consumer understood, for example, how the finance charge on this unilateral loan relates to the bank's contractual overdraft protection plan.

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[22] Cited in the 1993 CFA study discussed in B. Clark and B. Clark, *The Law of Bank Deposits, Collections and Credit Cards*, Para. 3.01[4][c][i] (1999).

[23] See Robert D. Hershey, Jr., "At Banks, the Fees Just Keep on Coming," NYT Bus. Sec. p. 11 (11/1/98). See also Barbara Whitaker, "Credit Cards Get Tough on the Tardy: New Income Sought As Interest Rates Fall," NYT (1/31/99); Rick Brooks, "How Banks Make the Most of Bounced Checks," WSJ, p. B1 (2/25/99).

As a consequence of this public notice about the switch from fees as compensation to fees as "off the price tag" profit centers, the banking industry is not the only one seeing closer scrutiny as to whether the fees are justifiable. See, e.g. *Metlife Capital Financial Corp. v. Washington Ave. Assoc.*, 713 A.2d 527 (N.J. App. 1998)(examining a 5% late charge on a mortgage), *rev'd* 1999 WL 436126 (N.J. Sup. Ct., June 30, 1999) (reversal expressly notes that decision does not address consumer contracts, and that this transaction involved an "arms length, fully negotiated transaction between two sophisticated commercial parties, each represented by counsel." Id at 8.)

[24] See note 6, above.

It is quite possible that a contractual overdraft protection plan is cheaper. If so, a full understanding of the rate differential may encourage the consumer to make the economically sound decision to sign up for contractual over-draft protection, rather than leaving it solely up to the bank.

It should be noted, too, that such purposes are not well served, for example, if the customer is told that the overdraft fee is $5 per day, while the contractual overdraft protection plan is 21% APR, for example.[25] (On the hypothetical $120 overdraft loan, a 21% APR would cost approximately 69 cents per day, though few customers would easily understand how the two loans compared.) As the First Circuit has noted, deregulation has made honest and understandable treatment of the applicable interest rates even more important. *Chroniak v. Golden Investment Corp.*, 983 F.2d 1140 (1st Cir. 1993).

There are a number of implications which flow from the fact that the per diem charge is a finance charge, bringing these loans under the ICCC where they are made for personal, family or household purposes. The earlier advisories from the Administrator and Banking division noted the 21% rate cap. Since that time, the ICCC has been amended so that open-end credit now is subject only to a contractual cap, not a statutory cap.[26] ICCC § 537.2402. However, whether a loan is open-end or closed-end is a factual question, dependent upon whether it meets the three-pronged test in ICCC § 537.1301(29).

Please note that this is the advice of the Administrator, and not a formal opinion of the Attorney General.

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[25] Effective July 1, 1999, ICCC § 537.2501 authorizes a reasonable annual account maintenance fee, payable in advance, in conjunction with an overdraft protection line of credit.

[26] Note, however, that it would still be a violation of the ICCC to exceed the contractual cap, *cf. Garrison v. First Federal Savings & Loan Assoc. of So. Car.*, 402 S.E.2d 24 (Va. 1991)(imposing usury penalties when the rate charged exceeded the rate agreed to under the contract).